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NORTHERN DISTRICT OF CALIFORNIA

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KANDY KISS OF CALIFORNIA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BISCOTTI, INC.,)	CASE NO. C 07-3681 BZ
)	
Plaintiff,)	DEFENDANT KANDY KISS OF
)	CALIFORNIA, INC.'S ANSWER
vs.)	TO COMPLAINT FOR
)	COPYRIGHT INFRINGEMENT
KANDY KISS OF CALIFORNIA, INC.,)	
d/b/a Zoey; and DOES 1 through 10,)	[JURY TRIAL DEMANDED]
inclusive.)	
)	
Defendants.)	

COMES NOW Defendant KANDY KISS OF CALIFORNIA, INC.
(hereafter referred to as the "Defendant") for itself only and answers Plaintiff
Biscotti, Inc. ("Biscotti")'s Complaint for Copyright Infringement (hereafter
referred to as the "Complaint") on file herein, admitting, denying and alleging as
follows:

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1 1. In answering Paragraph 1 of the Complaint, Defendant denies,
2 generally and specifically, the allegations contained therein.

3 2. In answering Paragraph 2 of the Complaint, Defendant lacks sufficient
4 information or belief to admit or deny the allegations in the aforementioned
5 paragraph, and basing its response on such lack of information and belief,
6 Defendant denies, generally and specifically, the allegations contained therein.

7 3. In answering Paragraph 3 of the Complaint, Defendant admits that it
8 is a California corporation in good standing.

9 4. In answering Paragraph 4 of the Complaint, Defendant lacks sufficient
10 information or belief to admit or deny the allegations in the aforementioned
11 paragraph, and basing its response on such lack of information and belief,
12 Defendant denies, generally and specifically, the allegations contained therein.

13 5. In answering Paragraph 5 of the Complaint, Defendant lacks sufficient
14 information or belief to admit or deny the allegations in the aforementioned
15 paragraph, and basing its response on such lack of information and belief,
16 Defendant denies, generally and specifically, the allegations contained therein.

17 6. In answering Paragraph 6 of the Complaint, Defendant denies,
18 generally and specifically, the allegations contained therein.

19 7. In answering Paragraph 7 of the Complaint, Defendant lacks sufficient
20 information or belief to admit or deny the allegations in the aforementioned
21 paragraph, and basing its response on such lack of information and belief,
22 Defendant denies, generally and specifically, the allegations contained therein.

23 8. In answering Paragraph 8 of the Complaint, Defendant lacks sufficient
24 information or belief to admit or deny the allegations in the aforementioned
25 paragraph, and basing its response on such lack of information and belief,
26 Defendant denies, generally and specifically, the allegations contained therein.

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1 9. In answering Paragraph 9 of the Complaint, Defendant lacks sufficient
2 information or belief to admit or deny the allegations in the aforementioned
3 paragraph, and basing its response on such lack of information and belief,
4 Defendant denies, generally and specifically, the allegations contained therein.

5 10. In answering Paragraph 10 of the Complaint, Defendant lacks
6 sufficient information or belief to admit or deny the allegations in the
7 aforementioned paragraph, and basing its response on such lack of information and
8 belief, Defendant denies, generally and specifically, the allegations contained
9 therein.

10 11. In answering Paragraph 11 of the Complaint, Defendant lacks
11 sufficient information or belief to admit or deny the allegations in the
12 aforementioned paragraph, and basing its response on such lack of information and
13 belief, Defendant denies, generally and specifically, the allegations contained
14 therein.

15 12. In answering Paragraph 12 of the Complaint, Defendant lacks
16 sufficient information or belief to admit or deny the allegations in the
17 aforementioned paragraph, and basing its response on such lack of information and
18 belief, Defendant denies, generally and specifically, the allegations contained
19 therein.

20 13. In answering Paragraph 13 of the Complaint, Defendant denies,
21 generally and specifically, the allegations contained therein.

22 14. In answering Paragraph 14 of the Complaint, Defendant denies,
23 generally and specifically, the allegations contained therein.

24 15. In answering Paragraph 15 of the Complaint, Defendant denies,
25 generally and specifically, the allegations contained therein.

26 16. In answering Paragraph 16 of the Complaint, Defendant incorporates
27 herein its prior response to Paragraphs 1 through 15 as though set forth in full.
28

17. In answering Paragraph 17 of the Complaint, Defendant denies generally and specifically, the allegations contained therein.

18. In answering Paragraph 18 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

19. In answering Paragraph 19 of the Complaint, Defendant lacks sufficient information or belief to admit or deny the allegations in the aforementioned paragraph, and basing its response on such lack of information and belief, Defendant denies, generally and specifically, the allegations contained therein.

20. In answering Paragraph 20 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

21. In answering Paragraph 21 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

22. In answering Paragraph 22 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

23. In answering Paragraph 23 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

24. In answering Paragraph 24 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

25. In answering Paragraph 25 of the Complaint, Defendant denies, generally and specifically, the allegations contained therein.

26. Defendant asserts the following Affirmative Defenses:

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

27. The Complaint fails to state facts sufficient to constitute any claim for relief.

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1 SECOND AFFIRMATIVE DEFENSE

2 28. Plaintiff's copyright, if any, and/or copyright registration, if any, are
3 invalid.

4 THIRD AFFIRMATIVE DEFENSE

5 29. The alleged infringing work is not substantially similar to Plaintiff's
6 alleged work.

7 FOURTH AFFIRMATIVE DEFENSE

8 30. Plaintiff's claims for relief are barred, in whole or in part, by prior use
9 and/or registration.

10 FIFTH AFFIRMATIVE DEFENSE

11 31. Plaintiff lacks standing to bring the Complaint because, among other
12 things, Plaintiff is not the owner and/or author of the design, work, or mark at
13 issue.

14 SIXTH AFFIRMATIVE DEFENSE

15 32. If Defendant infringed any copyright interest allegedly held by
16 Plaintiff, Defendant did so with innocent intent.

17 SEVENTH AFFIRMATIVE DEFENSE

18 33. Plaintiff's subject design is not protected by copyright because it is
19 not an original work of authorship.

20 EIGHTH AFFIRMATIVE DEFENSE

21 34. Plaintiff's common law, state, or equitable claims are preempted by
22 among other things, 17 U.S.C. § 301.

23 NINTH AFFIRMATIVE DEFENSE

24 35. Plaintiff is barred from obtaining any relief due to its fraud, including
25 but not limited to, committing a fraud upon the Copyright Office.

26 TENTH AFFIRMATIVE DEFENSE

27 36. Plaintiff is barred from recovery because Plaintiff has committed
28 misuse of copyright.

ELEVENTH AFFIRMATIVE DEFENSE

37. Plaintiff's conduct with regards to the matters alleged in the Complaint was such that Plaintiff is barred by the equitable doctrine of unclean hands from obtaining the relief requested against Defendant.

TWELFTH AFFIRMATIVE DEFENSE

38. Some or all of the damages alleged by Plaintiff, if any, are to be offset by the damage sustained by Defendant as a result of Plaintiff's conduct.

THIRTEENTH AFFIRMATIVE DEFENSE

39. Plaintiff is not entitled to statutory damages or attorney's fees pursuant to, among other things, 17 U.S.C. § 412.

FOURTEENTH AFFIRMATIVE DEFENSE

40. Plaintiff, and others engaged in activities with respect to the work, design and/or mark, transactions, occurrences and incidents which are the subject of the Complaint, and by reasons of said activities and conduct, are estopped from asserting any claim for damages or seeking any other relief against Defendant.

FIFTEENTH AFFIRMATIVE DEFENSE

41. Defendant denies that it is responsible or liable in any way for the damages or loss alleged in the Complaint. However, if Defendant is found to be liable or responsible for any or all of the alleged damages or loss, Defendant alleges that its liability, if any, is not the sole proximate cause of the damage or loss, that the damage awarded to Plaintiff, if any, should be apportioned according to California state law by each parties' respective fault and legal responsibility of all parties, persons and entities, and their agents, servants, and employees who contributed to and/or cause such damages or loss according to the proof presented at the time of trial.

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1 SIXTEENTH AFFIRMATIVE DEFENSE

2 42. At all times, Defendant acted in a commercially reasonable and lawful
3 manner. Each and every act or statement done or made by the Defendant was a
4 good faith assertion of Defendant's rights and, therefore, was privileged and
5 justified.

6 SEVENTEENTH AFFIRMATIVE DEFENSE

7 43. At all relevant times, Defendant acted in a commercially reasonable
8 and lawful manner. Each and every act done or statement made by Defendant was
9 a good faith assertion of Defendant's rights and, therefore, was privileged and
10 justified.

11 EIGHTEENTH AFFIRMATIVE DEFENSE

12 44. Plaintiff failed to protect and/or enforce its alleged rights, and/or
13 engaged in conduct and activities sufficient to constitute a waiver of any alleged
14 breach of duty, negligent act, omission, or any other conduct, if any, as set forth in
15 the Complaint.

16 NINETEENTH AFFIRMATIVE DEFENSE

17 45. Plaintiff waited an unreasonable period of time before asserting its
18 claims, if any, against Defendant, and it is barred from asserting such claims under
19 the doctrine of laches.

20 TWENTIETH AFFIRMATIVE DEFENSE

21 46. Plaintiff, though under an affirmative duty to do so, failed and
22 neglected to mitigate its alleged damages, if any, and cannot recover against
23 Defendant, whether as alleged or otherwise.

24 TWENTY-FIRST AFFIRMATIVE DEFENSE

25 47. The damages suffered by Plaintiff, if any, were the direct and
26 proximate result of the acts, omission, or negligence of persons or entities other
27 than Defendant.

TWENTY-SECOND AFFIRMATIVE DEFENSE

48. Defendant presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, affirmative defense available. Defendant reserves the right to assert additional defenses, including but not limited to, res judicata and collateral estoppel, in the event that the discovery indicates that they would be appropriate.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff take nothing by the Complaint and that judgment be rendered in favor of the Defendant.
2. For costs of suit, including reasonable attorneys' fees if permitted by agreement or by statute; and
3. For such other and further relief as the court deems just and proper.

DEMAND FOR JURY


Defendant hereby requests a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in this Complaint and any subsequent amended complaint or consolidated action.

Dated: September 21, 2007

Respectfully submitted,

EZRA | BRUTZKUS | GUBNER LLP

By:


 MARK D. BRUTZKUS
 LUIS A. GARCIA
 Attorneys for Defendant
 KANDY KISS OF CALIFORNIA,
 INC.

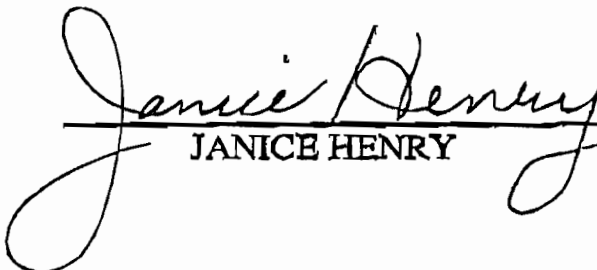
PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and am not a party to the within action or proceeding. I am employed by the law firm of Ezra|Brutzkus|Gubner LLP located at 21650 Oxnard Street, Suite 500, Woodland Hills, CA 91367, Telephone: (818) 827-9000, Facsimile: (818) 827-9099.

On September 24, 2007, I served the foregoing document described as **DEFENDANT KANDY KISS OF CALIFORNIA, INC.'S ANSWER TO COMPLAINT FOR COPYRIGHT INFRINGEMENT** on the interested parties in said action, as follows:

PLEASE SEE ATTACHED SERVICE LIST

- ☒ (By Mail) I caused such envelope with postage thereon, fully prepaid, to be placed in the United States mail. Executed on September 24, 2007, at Woodland Hills, California.
- ☐ (By Facsimile) I caused said document to be sent via facsimile. Executed on _____, 2007, at Woodland Hills, California.
- ☐ (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee. Executed _____, 2007, at Woodland Hills, California.
- ☐ (By Federal Express/Express Mail) I caused said document to be sent via Federal Express / Express Mail for next business day delivery. Executed on _____, 2007, at Woodland Hills, California.
- ☒ (Federal) Executed this 24th day of September, 2007, I declare that I am an employee in the offices of a member of the State Bar of this Court at whose direction the service was made.


JANICE HENRY

SERVICE LIST

Biscotti, Inc. vs. Kandy Kiss of California, Inc., etc.
U.S.D.C. ND CA Case No. C 07-3681 BZ

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